Supreme Court, U.S.
FILED
JAN 30 1997
CLERK

(14)

No. 96-79

In the Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS, PETITIONER

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID B. BOGGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States as *amicus curiae*, requests leave to file a supplemental brief in this case. This supplemental brief is submitted in light of questions from the Court at oral argument as to whether, under our interpretation of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), ERISA might effect an unconstitutional taking of property without just compensation. That question was not addressed by any of the parties in their briefs on the merits in this case. We respectfully suggest that supplemen-

tal briefing on the taking issue could assist the Court in its consideration of the question presented.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

This supplemental brief is submitted in light of questions at oral argument as to whether, under our interpretation of the Employment Retirement Income Security Act of 1974 (ERISA) in this case, ERISA might effect an unconstitutional taking of property without just compensation.

1. It is our position that state community property law "relate[s] to" a plan, and therefore is "supersede[d]" by ERISA, 29 U.S.C. 1144(a), to the extent state law purports to create a property interest in assets held by an ERISA plan in trust for the exclusive benefit of the participant and of beneficiaries designated by the partici-

pant, the plan, or ERISA itself.[1] ERISA provides for state community property law to enter into the ownership of plan assets or the payment of plan benefits only pursuant to a qualified domestic relations order (QDRO). See 29 U.S.C. 1056(d)(3), 1144(b)(7). Qualification of a domestic relations order by the plan entitles the ex-spouse or child for whose benefit the order was entered (the "alternate payee") to payments from the plan in accordance with the QDRO as a matter of federal law, not state law of its force. See 29 U.S.C. 1056(d)(3)(J).

At oral argument, it was suggested that, if ERISA superseded state community property laws that would otherwise have granted a nonparticipant spouse an interest in a participant's pension plan, then ERISA might have effected a taking of Dorothy Boggs' interest in Isaac Boggs' pension plans. We do not agree.

2. As an initial matter, the taking question could arise only with respect to assets held by the plan for Mr. Boggs as of ERISA's effective date, September 2, 1974. At least as of that date, ERISA "supersede[d]" "any and all State laws insofar as they may now or hereafter relate to" a plan, 29 U.S.C. 1144(a), and thus prevented the subsequent creation of any state-law property interest in plans in the first place. Accordingly, there is no basis for concern that, after ERISA's enactment, Dorothy Boggs might have obtained a state-law interest in the plan that was later "taken" by ERISA. Moreover, after that enactment, state law was superseded with respect to both defined benefit plans and defined contribution plans, such as Mr. Boggs' stock and savings plans. See 29 U.S.C.

[1] We use the term "participant" here in its meaning as given in ERISA, "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * * or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). In this case, Isaac Boggs was the participant, and Dorothy Boggs, before her death, was a nonparticipant spouse.

1055(a), (b)(1)(A) and (b)(1)(C)(i) (providing for joint and survivor annuity payments from both defined benefit and defined contribution plans).

3. a. No taking problem arises with respect to assets in Mr. Boggs' plans prior to enactment of ERISA either. Pension plans were established over the years in an area with the inherent potential for regulation, state or federal.[2] No taking arose from the adoption of comprehensive federal regulation for the benefit of participants and their spouses, even though it might have altered prior expectations about the manner in which benefits would be paid out. See *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 646 (1993); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226-227 (1986); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). In this case, for example, Mr. Boggs had no property right protected by the Fifth Amendment to prevent the adoption of measures (such as ERISA) requiring that his employer's plan provide new safeguards (such as a survivor's annuity) for his wife. Because any interest Dorothy Boggs had in Mr. Boggs' plans before 1974 was derivative of her husband's interest, she also had no property right to prevent such regulation.

b. The circumstances of this case also make clear that no taking of property occurred upon the enactment of ERISA in 1974. We assume that, under Louisiana law, Dorothy Boggs had a community property interest in Isaac Boggs' pre-ERISA pension plans that could have been passed to her heirs. Nonetheless, there was no "taking" of such a property interest, even if ERISA prevented her from bequeathing to her children any

[2] See, *e.g.*, Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958); 29 U.S.C. 301-309 (1964); Employee Benefits Comm., American Bar Ass'n, *Employee Benefits Law* 1-5 (1991) (pre-ERISA history of pension regulation).

interest in Isaac Boggs' pension that she might have possessed at her death.

Here, Dorothy Boggs never exercised any *right* to make a testamentary transfer to respondents of her interest in her husband's pension plans. Respondents succeeded to her interest by operation of Louisiana's forced heirship law, and her will bequeathed to them nothing more than the interest that state law gave them. Dorothy Boggs' will, in fact, manifested an intent to bequeath to her husband outright the maximum amount "permitted under the law."[3] Thus, if Louisiana had amended its succession law before Dorothy Boggs' death to abolish forced heirship (as Louisiana in fact did after her death),[4] the terms of her will would have effectively bequeathed to Isaac Boggs outright her entire community property interest in his pension plans. Rather than taking from Dorothy Boggs a desired ability to pass her interest to her children, therefore, ERISA eliminated a state-law obstacle (the forced heirship law) that limited

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[3] Dorothy Boggs' will (Stip. Doc. C) stated:

> I, DOROTHY McDONALD BOGGS, make this last will and testament, revoking all others.
>
> I give and bequeath the maximum permitted under the law to my beloved husband, Isaac E. Boggs, Jr., together with the lifetime usufruct of the balance.
>
> I name and appoint my husband, Isaac E. Boggs, Jr., as the executor of my estate with seizin and without bond.
>
> IN WITNESS THEREOF, I have signed this my last will in the presence of the witnesses hereinafter named and undersigned.

[4] Louisiana has recently abolished forced heirship except for children under 24 years of age and certain disabled dependents. K.V. Lorio, *Forced Heirship: The Citadel Has Fallen—Or Has It?*, 44 La. B.J. 16 (1996); La. Const. Art. XII, § 5; 1996 La. Acts No. 77; 1995 La. Acts No. 1180.

Dorothy Boggs' ability to pass her interest to her husband.[5]

As a practical matter, the effect of ERISA was to provide that, after Dorothy Boggs' death, her interest in Isaac Boggs' plans was to be left outright to her husband rather than partly to her children (subject to her husband's lifetime use). The situation is the same as if Louisiana had changed its law during Dorothy Boggs' lifetime to provide that, after the death of one spouse, that spouse's community property interest shall pass to the surviving spouse (the "terminable interest rule").[6] Such a change in state law would surely not have amounted to a "taking." As the Court has observed, "rules of descent [are] subject to change by the law-making power as to any [property] not already passed to the heir by the death of the owner." *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918);

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[5] In general, the change effected by ERISA also ensures significant tax benefits for the estates of nonparticipant spouses. If a nonparticipant spouse had a state-law community property interest in the participant's pension plan that was not superseded by ERISA, then, if the nonparticipant spouse died first, her interest in the participant's plan would become includible in her gross estate for federal estate tax purposes. See 26 U.S.C. 2031(a); *Allard* v. *Frech*, 754 S.W.2d 111, 114 (Tex. 1988) (under Texas law, one half of spouse's retirement benefits earned during marriage are includible in decedent's estate), cert. denied, 488 U.S. 1006 (1989); but cf. *Hoppe* v. *Godeke*, 774 S.W.2d 368, 371 & n.1 (Tex. Ct. App. 1989) (noting that *Allard* majority did not reach issue of preemption of state law). And to the extent that the nonparticipant spouse might be required by forced heirship law to bequeath part of her interest to her children, she would not be eligible for the estate tax marital deduction (see 26 U.S.C. 2056(a)). Because ERISA effectively provides that the entire pension plan shall pass, after the nonparticipant spouse's death, to the participant, it eliminates potentially significant estate tax liability for the estate of the nonparticipant spouse.

[6] Texas has recently amended its community property law to adopt the "terminable interest rule" for community property interests in public pension plans. See *Kunin* v. *Feofanov*, 69 F.3d 59 (5th Cir. 1995).

see also *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 147 (1875); *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850). The Court has also stressed that "no legal principle" prevents a State from "taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good." *United States* v. *Perkins*, 163 U.S. 625, 628 (1896). Sovereigns may, therefore, substantially alter or restrict rules governing descent and disposition of property, at least if they provide an opportunity for a decedent to have his or her property pass at death to some member of the immediate family, such as a spouse or children.

In *Hodel* v. *Irving*, 481 U.S. 704 (1987), the Court "reaffirm[ed] the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Id.* at 717. The Court held there that the Indian Land Consolidation Act (ILCA) had taken a property right because the Act's escheat provision "amount[ed] to virtually the abrogation of the right to pass on a certain type of property * * * to one's heirs." *Id.* at 716. See also *id.* at 717 ("a *total* abrogation of these rights cannot be upheld"); *Babbitt* v. *Youpee*, No. 95-1595 (Jan. 21, 1997), slip op. 10 (noting that amended version of ILCA effected a taking because it "severely restrict[ed] the right of an individual to direct the descent of his property").[7] But

[7] The Court in *Youpee* noted that the amended ILCA allowed a decedent "to leave an interest only to a current owner in the same parcel," which was unlikely to include "lineal descendants." Slip op. 10. *Youpee* did not involve a situation where the property interest would pass by operation of law to the participant's *spouse*—a crucial point distinguishing that case from this one. Even though ERISA prevented Dorothy Boggs from bequeathing her community property interest in Isaac Boggs' pension plan to her lineal descendants, it did not transfer

whereas a law that "abrogat[es]" or "severely restricts" the ability to pass property to members of the immediate family may be subject to challenge as a taking, *Hodel* and *Youpee* did not suggest that a law that directs transfers on death through conventional channels—to a spouse, or to children—is anything other than a permissible regulation of the law of descent, rather than a taking of property.[8]

The hypothetical change in Louisiana law we have discussed above, putting in place the terminable interest rule and thus requiring post-death transfers of property to a spouse rather than a child, would not amount to a taking of property. Such a law, ensuring that property remained within the control of the family during at least the surviving spouse's lifetime, would be entirely consistent with conventional estate-planning principles and testamentary transfers. But if such a hypothetical state law could not be assailed as a taking of property without just compensation, then neither can ERISA's preemption provision, which effectively requires that the participant, rather than someone else, obtain the entire property right in any pension plans after the nonparticipant spouse's death.

4. a. We assume further that, under pre-ERISA state law, Dorothy Boggs would have had a community property interest in any *proceeds* of the pension plan that were received by Isaac Boggs after his retirement—but only if she were still alive, and if the community still existed, when he retired and began to enjoy those proceeds.

that interest to a stranger, a distant relative, or the government. Rather, it passed that interest to her spouse, consistent with her will and with conventional estate-planning principles. See note 5, *supra*.

[8] Thus, if a State today enacted into law a modified form of forced heirship for children (such as Louisiana long had in place), and thus prevented a decedent from bequeathing all of her estate to her spouse outright, it would not be subject to challenge on the ground that it had taken a property interest protected by the Constitution.

By its very nature, Dorothy Boggs' right to realize an interest in such payments was contingent upon her survival until the payments became due under the terms of the plans. But there never were any payments subject to that contingent interest, for Dorothy Boggs died before Isaac Boggs received any payments under the plans to which a community property interest would have attached.

Contingencies of that kind are commonplace. They form the cornerstones of such familiar programs as the Old Age, Survivors, and Disability Insurance Program under the Social Security Act. The loss of future benefits under Isaac Boggs' plans that Dorothy Boggs' estate suffered when she died before plan benefits became payable should not, therefore, be seen as a taking of her rights. It was, rather, a termination of those rights under the terms of the plans governing them.

b. Furthermore, ERISA provided nonparticipant spouses with substantial benefits in return for any possible loss of the community property interest in the participant's benefits. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987) ("reciprocity of advantage" defeats a claim of a taking). Most importantly, ERISA provided participants and their beneficiaries (frequently their spouses) with important protections for the pension assets, such as funding and vesting requirements. See 29 U.S.C. 1051-1061, 1081-1086. Spouses of participants received assurances, previously lacking in the law, that they would actually receive at least some part of the pension benefits that the participants had earned during a lifetime of employment. It would be highly ironic if ERISA, designed to assure that employees and their dependents would actually be able to enjoy their benefits for retirement purposes, were held to constitute a taking of their property, when that property

was significantly less protected before ERISA's enactment.[9]

In addition, when ERISA was first enacted, it provided that any pension plan that paid benefits to a participant in the form of an annuity was also required to offer that benefit in the form of a joint and survivor annuity, with the participant's surviving spouse as the beneficiary of the survivor annuity. See 29 U.S.C. 1055(a) (1976); Pub. L. No. 93-406, § 205(a), 88 Stat. 862. Congress was concerned about the "hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse's retirement years should he predecease her. To correct this situation, [Congress required] that if a plan provides for a lifetime annuity then * * * the plan must provide for a joint and survivor annuity." H.R. Rep. No. 807, 93d Cong., 2d Sess. 67 (1974); see also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 279 (1974). Thus, under ERISA as originally enacted, Dorothy Boggs obtained a contingent right to a survivor annuity under her husband's pension plan, payable for life, if she survived him and if Isaac Boggs did not elect a different form of benefits.[10]

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[9] Community property law may, in certain circumstances, give a spouse the right to prevent alienation of community property by the other spouse. But see La. Civ. Code Ann. art. 2346 (West 1985) (providing that either spouse may dispose of community property). Even if we assume, arguendo, that Louisiana community property law would have enabled Dorothy Boggs to prevent Isaac Boggs from alienating his pension benefits, ERISA clearly did not "take" that interest from Dorothy Boggs. To the contrary, ERISA strengthened that interest by strictly prohibiting *any* assignment or alienation of benefits under an ERISA plan. See U.S. Br. 12; 29 U.S.C. 1056(d)(1); 26 U.S.C. 401(a)(13).

[10] ERISA's protections for surviving spouses were substantially strengthened by Congress in the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426. Although ERISA, as originally enacted, provided that any pension plan that paid annuity benefits had

* * * * *

For the foregoing reasons, a construction of ERISA as superseding a nonparticipant spouse's state-law community property interest in the participant's pension as that interest might have existed before ERISA's enactment raises no constitutional difficulty under the Just Compensation Clause of the Fifth Amendment.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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to provide for a joint and survivor annuity, Congress concluded that the protection for surviving spouses was less than optimal in three respects. First, as originally enacted, ERISA did not require that a participant be paid benefits in the form of an annuity; therefore, if the participant did not receive benefits in the form of an annuity, neither would the surviving spouse. The REA provided for all defined benefit plans, and most defined contribution plans, to offer a joint and survivor annuity to the participant and spouse. See U.S. Br. 12-13; 29 U.S.C. 1055(a). Second, under ERISA as originally enacted, a participant could elect not to receive the joint and survivor annuity benefit, but to receive benefits in some other form (including a lifetime annuity for himself only). See 29 U.S.C. 1055(e) (1976). Under the REA, the spouse cannot be deprived, without her express written consent, of her right to the survivor annuity benefit or to the balance of an individual account plan, when the participant dies before retirement. See U.S. Br. 13; 29 U.S.C. 1055(c)(2). Third, the REA made special provisions for both annuities and distributions to surviving spouses of participants who die before retiring but while fully vested. U.S. Br. 13; 29 U.S.C. 1055(a)(2).